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Fax Number: 703-602-0350  
Phone Number:

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From: Giovanna M. Cinelli  
Sender's Direct Line: 703-744-8075  
Date: May 15, 2002  
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Comments:

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RE: DFARS Case 2002-D005

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May 15, 2002

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**VIA FACSIMILE: 703/602-0350**

Defense Acquisition Regulations Council  
OUSD(AT&L)DP(DAR), IMD 3C132  
3062 Defense Pentagon  
Washington, D.C. 20301-3062

Attn Ms. Amy Williams

**RE: DFARS Case 2002-D005**

Dear Ms. Williams:

This letter responds to the Department of Defense's request for comments to a proposed rule modifying customer involvement in foreign military sales ("FMS"). The Department published the rule on April 26, 2002, in the Federal Register. 67 Fed. Reg. 20713 (April 26, 2002) (Attachment 1). The rule proposes changes that are designed to promote more active participation by foreign military sales customers in the entire acquisition process from technical development through contract, pricing and related activity. See, e.g., 48 C.F.R. § 225.7304(b)(1)-(4). It also encourages, at the contracting officer's discretion, direct FMS customer interaction with industry providing the items, technology or services sought under the FMS case. *Id.* at § 225.7304(b), (d). The proposed rule discusses limitations to FMS customer participation in terms of cost or pricing data, unique contract requirements, or contractor proprietary data. *Id.* It does not appear to reference other applicable U.S. laws or regulations that impact a contractor's ability to share or develop technical information with a foreign party, even under U.S. Government aegis. In particular, the failure of the proposed rule to reference the U.S. export laws as limitations to FMS customer participation in the acquisition process ignores existing statutory obligations impacting any U.S. or foreign contractor and potentially places a contractor in the position of complying with contradictory obligations. Based on this deficiency, the rule should be amended, as suggested in more detail below, to address these obligations.

### EXISTING LEGAL OBLIGATIONS

The United States has controlled the export, import and transfer of commodities, technology and data, and certain services to foreign persons pursuant to long-standing statutory authority. See *Arms Export Control Act*, 22 U.S.C. § 2778 *et seq.* (2002 Supp.) ("AECA"); *International Emergency Economic Powers Act*, 50 U.S.C. § 1701 *et seq.* (2002 Supp.) ("IEEPA"); see also *International Traffic in Arms Regulations*, 22 C.F.R. part 120 *et seq.* (2002) ("ITAR"); *Export Administration Regulations*, 15 C.F.R. part 730 *et seq.* (2002) ("EAR"). In particular, the AECA and its implementing regulations, the ITAR, control the export, temporary import, transfer and retransfer or reexport to a foreign person of any item designated a defense article, technical data or

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defense service. 22 U.S.C. § 2778(a); 22 C.F.R. §§ 120.1(a), 120.6, 120.9, 120.10, 120.16, and 120.17. To the extent the Department of Defense is authorizing an FMS case for items – including technical data and defense services – controlled on the United States Munitions List ("USML"), the AECA and ITAR impose licensing requirements on parties subject to the statute and regulations prior to providing any item to a foreign person, unless a specific exemption applies. 22 C.F.R. §§ 123, 124, and 125. Items on the USML include vessels of war (ships, tanks, fighter aircraft), supporting electronics, missiles, rockets, chemical agents and other comparable items.

The statute and regulation provide no specific exclusions for contexts where these laws would not apply. For example, a person subject to the ITAR seeking to transfer technical data related to a defense article to a foreign person during the course of a litigation in the United States would be required to obtain export authorization from the State Department as readily as a person seeking to sell that same data to that same foreign person in a commercial context. Therefore, absent a specific exemption, these laws would apply equally to a contractor providing items, data or services to a foreign customer during the course of an FMS case. As noted above, however, no reference exists to these requirements in the proposed rules.

### MODIFICATIONS

Based on this deficiency, it appears that the proposed rule should be modified to:

1. include in the summary section of the regulation and in § 225.7304(a) a reference to the United States export laws that could impact interaction with a foreign FMS customer;
2. modify § 225.7304(c) to prohibit disclosure to the FMS customer, not only of proprietary data requiring contractor release permission, but of any export controlled data, information, or other item that does not have specific authorization for release by the cognizant U.S. Government licensing agency;
3. modify § 225.7304(d) to add a subsection (d)(4) limiting foreign customer participation in activities governed by the U.S. export laws, absent specific export authorization for release by the cognizant U.S. Government licensing agency; and

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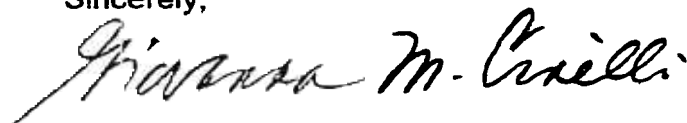
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4. add a subsection § 225.7304(i) which outlines the contracting officer's authorization and discretion when dealing with an FMS case involving export controlled commodities, technical data or defense services.

Apart from these modifications, the Department could coordinate with the Department of State and/or the Department of Commerce to consider the implementation of an exemption, where legally appropriate, for industry contractors participating in the FMS process at the behest of the Government. The ITAR, for example, contains limited exemptions for some of the proposed interaction, but no comprehensive exemption for activities discussed in the proposed rule appear to currently exist in that regulation. Similar limitations apply to any commodities and data governed by the EAR. However, absent the type of modifications noted above, an exemption would be needed to ensure that contractors subject to U.S. laws would be in a position to comply with their regulatory obligations.

Thank you for the opportunity to comment on this proposed rule. Please call me at 703/744-8075 or e-mail me at [gcinelli@pattonboggs.com](mailto:gcinelli@pattonboggs.com) with any questions.

Sincerely,



Giovanna M. Cinelli

## **ATTACHMENT 1**

- (2) Controlled corporation.
- (3) Controlling shareholder.
- (4) Coordinating group.
- (5) Discussions.
- (6) Established market.
- (7) Five-percent shareholder.
- (8) Similar acquisition.
- (9) Ten-percent shareholder.
- (i) [Reserved]
- (j) Examples.
- (k) Effective date.

Par. 3. Section 1.355-7 is added to read as follows:

**§ 1.355-7 Recognition of gain on certain distributions of stock or securities in connection with an acquisition.**

[The text of proposed § 1.355-7 is the same as the text of § 1.355-7T published elsewhere in this issue of the Federal Register].

Robert E. Wenzel,

*Deputy Commissioner of Internal Revenue.*

[FR Doc. 02-9818 Filed 4-23-02; 12:14 pm]

BILLING CODE 4830-01-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[SC-039; 043-200222(b); FRL-7202-3]

Approval and Promulgation of Implementation Plans South Carolina: Approval of Revisions to the 1-Hour Ozone Maintenance State Implementation Plan for the Cherokee County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** EPA is proposing to approve revisions to the Cherokee County 1-hour ozone maintenance area portion of the South Carolina Air Quality State Implementation Plan (SIP), submitted by the South Carolina Department of Health and Environmental Control (SC DHEC) on January 31, 2002. This SIP revision satisfies the requirement of section 175A(b) of the Clean Air Act (CAA) for the ten-year update for the Cherokee County maintenance plan. Additionally, this submittal explicitly identifies the motor vehicle emission budgets ("budgets") for oxides of nitrogen (NO<sub>x</sub>) and volatile organic compounds (VOC). In this action, EPA is also finding the NO<sub>x</sub> and VOC "budgets" supplied in this updated maintenance plan adequate, and is proposing approval of these "budgets." These budgets, identified for the year 2012, will be used for the purposes of conducting transportation conformity

analyses for Cherokee County, in accordance with the requirements of the CAA amendments of 1990 and the Transportation Conformity rule. In the Final Rules section of this Federal Register, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no significant, material, and adverse comments are received in response to the direct final rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time. **DATES:** Written comments must be received on or before May 28, 2002. **ADDRESSES:** All comments should be addressed to: Sean Lakeman or Lynorae Benjamin at the EPA, Region 4 Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.

Copies of the documents relative to this action are available for public inspection during normal business hours at the following locations. Persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day. Reference file number SC-039; 043-200222. The Region 4 office may have additional background documents not available at the other locations.

Air and Radiation Docket and Information Center (Air Docket 6102), EPA, 401 M Street, SW, Washington, DC 20460.

SC DHEC, Bureau of Air Quality, 2600 Bull Street, Columbia, South Carolina 29201.

**FOR FURTHER INFORMATION CONTACT:** Sean Lakeman, Regulatory Planning Section, Air, Pesticides and Toxics Management Division, Region 4, Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Mr. Lakeman's telephone number is (404) 562-9043. He can also be reached via electronic mail at [lakeman.sean@epa.gov](mailto:lakeman.sean@epa.gov).

Lynorae Benjamin, Air Quality Modeling and Transportation Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth

Street, SW, Atlanta, Georgia 30303-8960. Ms. Benjamin's telephone number is (404) 562-9040. She can also be reached via electronic mail at [benjamin.lynorae@epa.gov](mailto:benjamin.lynorae@epa.gov).

**SUPPLEMENTARY INFORMATION:** For additional information see the direct final rule which is published in the Rules section of this Federal Register.

Dated: April 18, 2002.

Winston A. Smith,

*Acting Regional Administrator, Region 4.*

[FR Doc. 02-10335 Filed 4-25-02; 8:45 am]

BILLING CODE 4360-50-P

## DEPARTMENT OF DEFENSE

### 48 CFR Part 225

[DFARS Case 2002-D005]

Defense Federal Acquisition Regulation Supplement; Foreign Military Sales Customer Involvement

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to add policy regarding the participation of foreign military sales (FMS) customers in the development of contracts that DoD awards on their behalf. The objective is to provide FMS customers with more visibility into the contract pricing and award process.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before June 25, 2002, to be considered in the formation of the final rule.

**ADDRESSES:** Respondents may submit comments directly on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. As an alternative, respondents may e-mail comments to: [dfars@acq.osd.mil](mailto:dfars@acq.osd.mil). Please cite DFARS Case 2002-D005 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams, OUSD(AT&L)DP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; facsimile (703) 602-0350. Please cite DFARS Case 2002-D005.

At the end of the comment period, interested parties may view public comments on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602-0328.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

FMS customers have requested more visibility into the preparation and pricing of contracts that DoD awards on their behalf. This proposed rule revises DFARS 225.7304 to provide for greater involvement of FMS customers in the contract award process, while protecting against unauthorized disclosure of contractor proprietary data.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

##### B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the involvement of FMS customers in contract development should have no significant effect on offerors or contractors. The rule provides for the protection of contractor proprietary data. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2002-D005.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

##### List of Subjects in 48 CFR Part 225

Government procurement.

Michele P. Peterson,  
Executive Editor, Defense Acquisition  
Regulations Council.

Therefore, DoD proposes to amend 48 CFR Part 225 as follows:

1. The authority citation for 48 CFR Part 225 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

#### PART 225—FOREIGN ACQUISITION

2. Section 225.7304 is revised to read as follows:

##### 225.7304 FMS customer involvement.

(a) FMS customers may request that a defense article or defense service be obtained from a particular contractor. In such cases, FAR 6.302-4 provides authority to contract without full and open competition. The FMS customer may also request that a subcontract be placed with a particular firm. The contracting officer shall honor such requests from the FMS customer only if the LOA or other written direction sufficiently fulfills the requirements of FAR subpart 6.3.

(b) FMS customers should be encouraged to participate with U.S. Government acquisition personnel in discussions with industry to—

- (1) Develop technical specifications;
- (2) Establish delivery schedules;
- (3) Identify any special warranty provisions or other requirements unique to the FMS customer; and
- (4) Review prices on varying alternatives, quantities, and options needed to make price-performance tradeoffs.

(c) Do not disclose to the FMS customer any data, including cost or pricing data, that is contractor proprietary unless the contractor authorizes its release.

(d) Except as provided in paragraph (e)(3) of this section, the degree of FMS customer participation in contract negotiations is left to the discretion of the contracting officer. Factors that may limit FMS customer participation include situations where—

- (1) The contract includes requirements for more than one FMS customer;
- (2) The contract includes unique U.S. requirements; or
- (3) Contractor proprietary data is a subject of negotiations.

(e) Do not allow representatives of the FMS customer to—

- (1) Direct the exclusion of certain firms from the solicitation process (They may suggest the inclusion of certain firms);
- (2) Interfere with a contractor's placement of subcontracts; or
- (3) Observe or participate in negotiations between the U.S. Government and the contractor involving cost or pricing data, unless a deviation is granted in accordance with subpart 201.4.

(f) Do not accept directions from the FMS customer on source selection decisions or contract terms (except that, upon timely notice, the contracting officer may attempt to obtain any special contract provisions, warranties, or other unique requirements requested by the FMS customer).

(g) Do not honor any requests by the FMS customer to reject any bid or proposal.

(h) If an FMS customer requests additional information concerning FMS contract prices, the contracting officer shall, after consultation with the contractor, provide sufficient information to demonstrate the reasonableness of the price and reasonable responses to relevant questions concerning contract price. This information—

(1) May include tailored responses, top-level pricing summaries, historical prices, or an explanation of any significant differences between the actual contract price and the estimated contract price included in the initial LOA; and

(2) May be provided orally, in writing, or by any other method acceptable to the contracting officer.

[FR Doc. 02-10093 Filed 4-25-02; 8:45 am]  
BILLING CODE 5001-05-P

#### DEPARTMENT OF DEFENSE

##### 48 CFR Parts 245 and 252

[DFARS Case 92-D024]

Defense Federal Acquisition  
Regulation Supplement;  
Demilitarization

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule; withdrawal.

**SUMMARY:** DoD is withdrawing the proposed rule published at 62 FR 30832 on June 5, 1997. The rule proposed amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to address demilitarization of excess property under Government contracts. DoD 4160.21-M-1, Defense Demilitarization Manual, is presently being revised to define DoD policy on this subject. After the revised manual is issued, DoD will reevaluate the need for DFARS changes pertaining to demilitarization.

FOR FURTHER INFORMATION CONTACT: Mr. Rick Layser, Defense Acquisition Regulations Council, OUSD(AT&L)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0293; facsimile (703) 602-0350. Please cite DFARS Case 92-D024.

Michele P. Peterson,  
Executive Editor, Defense Acquisition  
Regulations Council.  
[FR Doc. 02-10099 Filed 4-25-02; 8:45 am]  
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